BRB No. 06-0633

EDDIE D. DOVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERADA HESS CORPORATION	)	DATED ISSUED: FEB 22 2007
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Gary B. Pitts (Pitts & Associates), Houston, Texas, for claimant.

Thomas C. Fitzhugh III and Bradley T. Soshea (Fitzhugh, Elliott & Ammerman, P.C.), Houston, Texas, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order on Reconsideration (2004-LHC-1054) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to his back and groin while working for employer on July 22, 1997. Claimant underwent back surgery in August 1998, and multiple steroid

injections in 1999, as a result of this work incident. Claimant was prescribed medication for his ongoing back pain, and for the conditions of hypertension and depression. Claimant unsuccessfully attempted to return to light duty employment with employer, and employer thereafter voluntarily paid claimant disability and medical benefits.

Before the administrative law judge, the parties disputed the issues of the nature and extent of claimant's disability, claimant's average weekly wage at the time of his work-injury, and employer's liability for the medical charges of Dr. Ringer.[1] In his Decision and Order, the administrative law judge initially addressed claimant's restrictions, medications, and abilities and, applying these restrictions to the vocational evidence submitted by employer, concluded that employer failed to establish the availability of suitable alternate employment. Next, the administrative law judge determined that $822.27 fairly and reasonably represented claimant's wage-earning capacity at the time of his injury. Lastly, the administrative law judge concluded that claimant was not entitled to reimbursement from employer for the medical charges incurred as a result of his treatment with Dr. Ringer; the administrative law judge did, however, find employer liable for the reasonable and necessary medical expenses associated with the treatment of claimant's heart condition and depression. Accordingly, the administrative law judge awarded claimant ongoing permanent total disability benefits commencing March 13, 2001, as well as reasonable, appropriate and necessary medical expenses arising from his July 22, 1997, work-injury.

Employer then filed a motion with the administrative law judge urging reconsideration of the determination that employer failed to establish the availability of suitable alternate employment for claimant. Thereafter, employer filed a supplemental motion for reconsideration challenging the administrative law judge's finding that claimant's heart condition is causally related to his work-injury. In his Decision and Order on Reconsideration, the administrative law judge discussed the issues raised in employer's motion but denied the relief requested.

On appeal, employer challenges the administrative law judge's finding that claimant sustained a compensable heart condition that was related to his employment with employer, as well as the administrative law judge's award of total disability benefits to claimant. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant bears the burden of proving the existence of an injury, or harm, and that a work accident occurred or working conditions existed which could have caused the harm, in order to establish a *prima facie* case. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996); *Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994).

[1] Dr. Ringer performed surgery on claimant after claimant experienced sexual disfunction problems following his steroid injections.

It is claimant's burden to establish each element of his *prima facie* case. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). If these two elements are established, the Section 20(a), 33 U.S.C. §920(a), presumption applies to link claimant's injury or harm with his working conditions. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

Employer argues that the administrative law judge erred in finding that claimant sustained a compensable heart condition as a result of his work-related injury. Specifically, employer avers that claimant's testimony, supported by that of his wife, that he experienced heart problems post-injury is insufficient to establish the "harm" element of his *prima facie* case. We disagree. Employer did not contest the existence of claimant's cardio-vascular problems prior to the issuance of the administrative law judge's decision. *See* JX 1; Tr. at 14-18; Employer's post-hearing brief dated November 21, 2005. Moreover, in its supplemental motion for reconsideration filed with the administrative law judge, employer did not challenge the credibility of claimant's testimony regarding the existence of a post-injury heart condition; rather, employer acknowledged the existence of that condition but sought reconsideration of the presumed causal link between it and claimant's work injury. *See* Employer's Supplemental Motion for Reconsideration. Therefore, employer now raises, for the first time on appeal, the issue of the existence of claimant's post-injury cardio-vascular condition. In the instant case, claimant testified that he experienced heart problems, including heart attacks, high blood pressure and hypertension, following his work-related back surgery and steroid injections. *See* Tr. at 27-30. Claimant also noted that he has been prescribed nitro-glycerin pills. *Id.* at 30. Claimant's testimony in this regard is supported by his medical records, which indicate a increase in his blood pressure and the prescription of medication for hypertension. *See* CX 1 at 81, 89-91; EX 25 at 93-101; EX 30 at 9-10. In his Decision and Order, the administrative law judge found claimant's testimony to be credible. Decision and Order at 34. As the administrative law judge's credibility determination is not "inherently incredible or patently unreasonable," *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), it must be accepted by the Board. We thus affirm the administrative law judge's finding that claimant experienced heart problems and established a "harm" for purpose of his *prima facie* case.

Employer does not challenge the administrative law judge's finding that claimant received steroid injections as treatment for his work injury. If claimant's heart problems arose as a consequence of this treatment, they are work-related. *See, e.g., Mattera v. M/V Mary Antoinette, Pacific King, Inc.*, 20 BRBS 43 (1987). Employer contends, however, that the administrative law judge erred in invoking Section 20(a) in this regard because there is no scientific proof linking claimant's heart condition to his steroid treatment. We reject the contention that such evidence is necessary for invocation of the presumption. Claimant's *prima facie* case must at least allege an injury arising out of and in the course

of employment. *U.S. Industries*, 455 U.S. 608, 14 BRBS 631. Claimant is not required to prove that his working conditions in fact caused his harm in order to invoke the presumption; rather, claimant must show the existence of working conditions which could have caused the harm alleged. *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). Contrary to employer's contention, claimant's credible testimony is substantial evidence sufficient to support invocation of the presumption.[2] *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In this case, the administrative law judge relied on the testimony of claimant and his wife that claimant's heart problems developed after his work injury and steroid injections. He also credited claimant's testimony that Dr. Barnett advised claimant that steroids could have caused his heart problems.[3] Decision and Order at 13, 34. The administrative law judge expressly found that claimant's testimony was credible and was not contradicted by any other evidence. On these facts, we affirm his finding that Section 20(a) was invoked.

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[2] Employer cites an unpublished opinion of the Fifth Circuit, asserting that the court held that a claimant's "own opinion as to the ultimate cause of his injury should not be controlling. He is not a medical expert, so his beliefs regarding causality are alone insufficient." *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 105 Fed.Appx. 567, 572 (5th Cir. 2004). Employer takes this quote out of context. In affirming the Board's decision reversing an administrative law judge's finding that Section 20(a) was rebutted, the court agreed that claimant's statements relating his injury to a non-industrial accident were not sufficient to rebut the invoked presumption. Relevant to the present case, in discussing invocation, the court rejected employer's assertion that claimant was required to prove causation in order to meet his initial burden, stating that claimant must "prove conditions that *might* have caused, aggravated or accelerated an injury." *Id.* (emphasis in original). Since claimant's employment included lifting and carrying heavy boxes every day, and "such strenuous work might easily have caused or worsened his back condition over time," the court affirmed the finding that Section 20(a) was invoked. In the present case, the administrative law judge did not rely on claimant's testimony to prove a causal nexus, but credited it in finding that the proven working conditions could have caused claimant's heart problems.

[3] Employer contends that claimant's testimony regarding his treatment with Dr. Barnett is hearsay. Dr. Barnett is deceased, and his records are not in evidence. However, hearsay evidence is admissible in administrative proceedings provided it is reliable and probative. *See* 33 U.S.C.§923(a); *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005); *Vonthronsonhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990). The administrative law judge could rely on this evidence as he specifically ruled favorably on claimant's credibility. Moreover, employer had the opportunity to cross-examine claimant, as he testified at the hearing and by deposition.

Employer next contends that, if claimant is entitled to invocation of the presumption, the "complete lack of *any* reference to this causation in the voluminous record rebuts the presumption."[4] *See* Employer's brief at 11 (emphasis in original). We disagree. Upon invocation of the Section 20(a) presumption, the burden shifts to the employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); S*winton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If employer rebuts the presumption, then the issue of causation must be decided by weighing the evidence in the record as a whole. *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *Stevens*, 23 BRBS 191. In the instant case, employer concedes that the record contains no evidence which would sever the presumed causal relationship between claimant's cardio-vascular problems and his work-related steroid injections. Thus, we affirm the administrative law judge's determination that employer did not rebut the presumption, and his consequent conclusion that the treatment necessitated by claimant's heart condition is work-related.

Employer next challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment Where, as in the instant case, it is uncontroverted that claimant is unable to return to his usual employment duties with employer as a result of his work-related injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *Wilson v. Dravo Corp.*, 22 BRBS 459 (1989)(Lawrence, J., dissenting).

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[4] Contrary to employer's contention on appeal, the decision of the United States Court of Appeals for the Fifth Circuit in *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998), does not support its position regarding rebuttal. Rather, the Fifth Circuit in *Gooden* set forth the well-established principle that employer can rebut the invoked Section 20(a) presumption through substantial evidence establishing the absence of a connection between claimant's injury and his employment. *Gooden*, 135 F.3d at 1068, 32 BRBS at 61(CRT).

In the instant case, claimant testified that be continues to suffer from significant back pain, that he continues to take prescription medication for that pain as well as for depression and his cardio-vascular conditions,[5] and as a result of his work-related conditions and medications he has trouble sleeping. *See* Tr. at 27-32. Dr. Kushwaha, a Board-certified orthopedic surgeon who examined claimant on two occasions, testified that an MRI of claimant's back revealed problems at the point of claimant's prior surgery, specifically instability, some disc herniation and stenosis. *See* EX 30 at 7-8. Dr. Kushwaha conceded that while claimant was presently taking medications for pain, depression, and hypertension and a muscle relaxer, he was unaware of the precise amount of prescription medication that claimant was consuming each day. *Id.* at 9-11. While stating that it was certainly possible for claimant to work eight hours a day, Dr. Kushwaha opined that claimant would have a difficult time working if he was required to take eight to ten pain pills a day; Dr. Kushwaha concluded, however, that claimant should be able to work while taking a moderate amount of pain medication. *Id.* at 11-12. After placing restrictions on claimant that included limited sitting, walking and standing, Dr. Kushwaha opined that claimant was capable of performing the work identified by employer's vocational expert. *Id.* at 11-14. Dr. Likover examined claimant on December 9, 2004 and thereafter opined, after noting that a CAT scan revealed protrusions at L5-S1 and L4-5, that claimant was capable of returning to work with no restrictions placed upon his physical activities. EX 28.

Mr. Quintanilla, employer's vocational expert, prepared two labor market surveys in which he identified multiple sedentary employment opportunities which he stated were available and suitable for claimant based upon the medical records which he reviewed. Mr. Quintanilla noted that his review of claimant's medical records did not reveal the implementation of restrictions based on claimant's prescribed medications. *See* Tr. at 67-79; EXs 17, 29.

In addressing the extent of claimant's post-injury disability, the administrative law judge set forth at length the lay and medical testimony of record. Decision and Order at 11-32. In addressing that evidence, the administrative law judge initially gave less weight to Dr. Likover's unrestricted release of claimant to return to work, finding that this opinion was contrary to the weight of the medical evidence and claimant's testimony. *Id.* at 31. Next, while acknowledging that Dr. Kushwaha approved the positions identified by Mr. Quintanilla as being within claimant's prescribed physical restrictions, the administrative law judge found that Dr. Kushwaha also expressed hesitation when rendering that opinion based upon his uncertainty regarding the level of medication that

[5] Specifically, claimant testified that he has been prescribed Hydrocodone, Zoloft for his depression, and Corgard and nitroglycerin pills for his cardio-vascular conditions. *See* Tr. at 27-30.

claimant was taking.[6] *Id.* at 32. Finding that claimant needs ongoing pain medication and has difficulty sleeping, the administrative law judge observed that, in identifying multiple positions which were within the restrictions placed on claimant in the medical records he reviewed, Mr. Quintanilla did not testify that claimant could do the jobs but stated that claimant's medications and fatigue could prove to be problematic in his quest for employment and that claimant should therefore give these positions a try in order to see how they work out for him. Decision and Order at 32; Tr. at 72. Based on this testimony, the administrative law judge concluded that the evidence did not establish that claimant could perform the identified jobs, and that employer therefore did not establish the availability of suitable alternate employment. *Id.*

Employer asserts that the administrative law judge erred in his evaluation of the evidence on this issue. Specifically, employer contends that the administrative law judge misinterpreted the testimony of Dr. Kushwaha and Mr. Quintanilla, whose testimony employer avers establishes claimant's ability to work full-time, and erred in accepting the unsupported testimony of claimant regarding his complaints of ongoing back pain. We reject this assertion of error by employer. It is well-established that in arriving at his decision the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Thus, it was within the province of the administrative law judge to assess claimant's credibility regarding his pain and limitations and to independently review the medical evidence. *See Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (administrative law judge entitled to weigh the evidence and choose the inferences he deems most reasonable considering the evidence as a whole and the common sense of the situation). Moreover, it is impermissible for the Board to substitute its own views for those of the administrative law judge; thus, the administrative law judge's findings may not be disregarded merely on the basis that other inferences might appear to be more reasonable. *See Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT).

On this record, the administrative law judge could rationally rely upon claimant's testimony regarding his ongoing back pain, his need for multiple prescriptive medications, and his limitations. *Id.* Moreover, the administrative law judge reasonably concluded that claimant was not capable of full-time, 8-hour a day employment, based upon his finding that Dr. Kushwaha, in light of his uncertainty regarding the amount of

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[6] Additionally, the administrative law judge stated that it is not clear whether the positions identified in employer's labor market survey in fact accommodated claimant's restrictions. Decision and Order at 32. A review of employer's two labor market surveys indicates that while those surveys describe the identified positions as being either "medium," "light" or "sedentary," they do not set forth the actual requirements of the jobs. *See* EXs 17, 29.

daily medications taken by claimant, expressed hesitation regarding claimant's ability to perform the jobs identified by employer's vocational expert, and Mr. Quintanilla's testimony that claimant's medications could prove problematic. As the administrative law judge addressed the totality of the lay and medical evidence of record and rationally concluded that claimant is incapable of full-time work, and as employer does not assert on appeal that it has established the availability of part-time employment opportunities for claimant, we affirm the administrative law judge's determination that employer did not establish the availability of suitable alternate employment, and his consequent award of total disability benefits to claimant. *See Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT); *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT).

Accordingly, the administrative law judge's Decision and Order and the Decision and Order on Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge